STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN SCHOEN,

Plaintiff-Appellant/Cross-Appellee,

v

COUNTY OF OAKLAND, OAK MANAGEMENT, OAK MANAGEMENT, L.L.C., and OAK MANAGEMENT GROUP, L.L.C.,

Defendants,

and

OAK MANAGEMENT CORPORATION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 6, 2006

No. 259459
Oakland Circuit Court
LC No. 03-054456-NO

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant, Oak Management Corporation (Oak Management). Because Oak Management was not in possession or control of the premises where plaintiff fell, we affirm.

This action arises out of injuries plaintiff sustained when she slipped and fell in a puddle of water left after a janitor had cleaned a gravy spill on the floor at the Waterford Oaks activity center. In June, 2004, Oak Management filed a motion for summary disposition arguing that it was not liable for plaintiff's injuries because, among other things, it did not have the requisite possession or control of the premises. The trial court agreed, granting Oak Management's motion for summary disposition and denying plaintiff's subsequent motion for reconsideration.

We review de novo a trial court's order granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In the instant case, Oak Management brought its motion pursuant to MCR 2.116(C)(8) and (C)(10). However, because the trial court examined evidence outside of the pleadings in rendering its decision, we will review this issue

under the standard applicable to MCR 2.116(C)(10). See *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997).

A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121; 597 NW2d 817. The court rules plainly require the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. Thus, a motion for summary disposition under MCR 2.116(C)(10) is to be evaluated by considering the substantively admissible evidence actually proffered in opposition to the motion, and a standard citing the mere possibility that the claim might be supported by evidence produced at trial may not be employed. *Id.*

On appeal, plaintiff argues that Oak Management was in possession and control of the premises and is thus liable for her injuries. We disagree. To prevail under a premises liability theory, the plaintiff must show that the defendant was in possession and control of the premises where the plaintiff's injury occurred. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 705; 644 NW2d 779 (2002). This Court has defined possession in this context as "'the right under which one may exercise control over something to the *exclusion of all others*.'" *Derbabian*, *supra* at 703, quoting Black's Law Dictionary (7th ed) (emphasis in *Derbabian*). Possession does not rest upon a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998).

Control, for purposes of premises liability, is defined as "'exercising restraint or direction over; dominate, regulate, or command,'" *Derbabian*, *supra* at 703, quoting *Random House Webster's College Dictionary* (1995), p 297, and as "'the power to . . . manage, direct, or oversee.'" *Derbabian*, *supra* at 703-704, quoting Black's Law Dictionary (7th ed). Although possession and control are incidents of title ownership, they may be loaned to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. *Orel v Uni-rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997).

In the instant case, plaintiff has not shown that Oak Management had possession or control of the premises. The exclusive right conferred upon Oak Management through the Concession Agreement between Oak Management and Oakland County was to engage in the food and beverage business at certain facilities owned and operated by Oakland County. The Concession Agreement did not, however, permit Oak Management unfettered control of any facility. Language in the Concession Agreement, in fact, required Oak Management to allow Oakland County representatives access at all reasonable hours to inspect the premises. As Oak Management did not have the right to exercise control over the premises to the exclusion of all others, it could not be deemed to have possessed the premises.

Oakland County also required users of the facility to "obey all Park rules and regulations." Further, on the night of the accident, not only were Parks and Recreation (Oakland County) employees responsible for setting up and cleaning the facility, but the Parks and Recreation commission was also required to station on-site employees for any "necessary assistance or emergency repairs." Indeed, the janitor who cleaned the gravy spill was an Oakland County employee. Plaintiff has presented no evidence indicating that Oak Management had any authority or ability to regulate, command, direct, or oversee in relation to the premises or Oakland County employees. *Derbabian*, *supra* at 703. Thus, viewing the facts in the light most favorable to plaintiff, Oak Management lacked possession of the facility and did not (and was contractually unable to) exercise control over the facility as it is defined for purposes of premises liability.

Given our resolution of the above issue, we need not address Oak Management's issues on cross-appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto